In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 942

KEVIN L. DONALDSON, F/K/A MERTON H. SWEET,
PETITIONER

v.

UNITED STATES OF AMERICA AND JOHN P. GRADY ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

1. In an investigation of the tax liability of petitioner, summonses were issued by a Special Agent of the Internal Revenue Service pursuant to Section 7602 of the Internal Revenue Code of 1954,[1] to the Acme Circus Operating Company, Inc., d/b/a Beatty-Cole Circus, and to an officer thereof, Joseph J. Mercurio, seeking records relating to petitioner's employment and compensation with that corporation for the

[1] "SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

"For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax

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tax years 1964–1967, inclusive (R. 9–11, 47–49).[2] The Circus and its officer refused to comply with the summons on the ground that petitioner had theretofore obtained a preliminary injunction against them from a district court.[3] When the United States filed petitions with the district court to enforce the summonses, they pleaded willingness to comply with the summonses in the absence of the preliminary injunction. (R. 25–26, 60–61.)

Petitioner, relying on Rule 24(a)(2) of the Federal Rules of Civil Procedure,[4] filed a motion to intervene

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or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

"(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

"(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

"(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry."
(26 U.S.C. Sec. 7602.)

[2] "R." references are to the appendix printed in the court of appeals which has been certified to this Court.

[3] The preliminary injunction is found at R. 29.

[4] In the court of appeals, as is noted in its opinion (Pet. 14–15), petitioner abandoned reliance on Rule 24(a)(2) as the basis of intervention and relied solely on *Reisman* v. *Caplin*, 375 U.S. 440.

in the summons enforcement actions in the district court, alleging that it was his tax liability which was under investigation, and further alleging as follows (R. 16–17, 54–55):

> 2. Kevin L. Donaldson, the Intervenor, has an interest relating to the transactions which are the subject of this action and is so situated that the disposition of this action may, as a practical matter, impair or impede his ability to protect that interest unless the Intervenor's interest is adequately represented by existing parties, in that a judgment of this Court may adversely and prejudicially effect [sic] the substantial rights and privileges secured to him by the Constitution of the United States, as will more definitely appear from the Intervenor's proposed Answer, a copy of which is attached hereto.

In a proposed answer tendered with his motion to intervene, petitioner alleged, *inter alia,* the following defenses (R. 19–20, 57, 58):

> IX
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> Petitioner [below], John P. Crady, Special Agent and Bruce B. Miller, Special Agent, New Orleans, Louisiana, are guilty of bad faith both with the Court and the Intervenor in asserting that they have been conducting an investigation to ascertain the correct income tax liability of Kevin L. Donaldson for the calendar years 1964, 1965, 1966 and 1967.
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> * * * * *

XII

> Special Agent Bruce B. Miller was assigned the investigation of Kevin L. Donaldson for the calendar years 1964, 1965, 1966 and 1967 for the express and sole purpose of obtaining evidence concerning any violations of the criminal statutes applicable to the tax laws of the United States and Special Agent John P. Grady is assisting Special Agent Miller in this investigation.

The district court denied petitioner's motion to intervene and entered orders enforcing the summonses against Joseph J. Mercurio and the Acme Circus Company (R. 32, 33–35, 68–70). These orders were affirmed by the court of appeals (Pet. 22–23).

2. In *Reisman* v. *Caplin,* 375 U.S. 440, 449–450, this Court stated that in judicial proceedings to enforce Internal Revenue summonses:

> the witness may challenge the summons on any appropriate ground. This would include, as the circuits have held, the defenses that the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution, *Boren* v. *Tucker,* 239 F. 2d 767, 772–773, as well as that it is protected by the attorney-client privilege, *Sale* v. *United States,* 228 F. 2d 682. In addition, the third parties might intervene to protect their interests, or in the event the taxpayer is not a party to the summons before the hearing officer, he, too, may intervene. See *In re Albert Lindley Lee Memorial Hospital, supra,* and *Corbin Deposit Bank* v. *United States, supra.* And this would be true

> whether the contempt be of a civil or criminal nature. Cf. *McCrone* v. *United States,* 307 U.S. 61 (1939); *Brody* v. *United States,* 243 F. 2d 378. Finally, we hold that such orders are appealable. * * * It follows that with a stay order a witness would suffer no injury while testing the summons.
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> Nor would there be a difference should the witness indicate—as has Peat, Marwick, Mitchell & Co.—that he would voluntarily turn the papers over to the Commisioner. If this be true, either the taxpayer or any affected party might restrain compliance, as the Commissioner suggests, until compliance is ordered by a court of competent jurisdiction. * * *

In the instant case, the court of appeals held that the taxpayer's mere interest in the subject matter of the investigation, *i.e.,* his own tax liabilities, is not a sufficient interest to justify intervention by him in the absence of allegations that he has an interest in property or in privileged relationships which he is entitled to protect. The government contends that this decision is a correct application of *Reisman* v. *Caplin, supra.* However, although the decisions are distinguishable from the instant case on their facts, other circuit courts appear to read *Reisman* more broadly. In particular, the Seventh Circuit in *United States* v. *Benford,* 406 F. 2d 1192, held that the facts in *Reisman* were not to be considered as a limitation on the language in that case suggesting the right to intervene. The *Benford* case held that the taxpayer is entitled to intervene solely on the basis of being the person whose taxes are being investigated.

The effective use of Internal Revenue summonses by the Commissioner of Internal Revenue has been seriously impaired by the rapidly increasing allowance of intervention by taxpayers and the ensuing delays caused by the extensive use of discovery procedures and the complications in hearings caused by the necessity of hearing the additional adversary parties involved after intervention is allowed. It is common for the enforcement of a single summons to require two years of litigation, and it is not uncommon for a single taxpayer to obtain temporary restraining orders and preliminary injunctions against as many as 20 witnesses whom the Internal Revenue Service wishes to interview. See Meldman, *Taxpayers' Efforts to Restrain Third Party Witnesses' Compliance with a Summons,* 46 Taxes 685 (1968); Meldman, *Procedures in Tax Controversies,* 51 Marq. L. Rev. 288–331 (1967–1968).

Finally, it has become necessary in almost every Internal Revenue summons enforcement proceeding to argue and litigate the contention of the respondent or intervenor that the summons is improper if the investigation includes an effort by the Internal Revenue Service to determine whether the tax delinquencies include criminal violations. The dispute revolves on the meaning of this Court's language in *Reisman, supra,* and on its reference to the right to judicial review of an administrative summons which is issued for an "improper purpose" in *United States* v. *Powell,* 379 U.S. 48, 58. Since the court below held that no "improper purpose" existed merely because the

investigation might disclose a criminal violation, this issue would appear to be embraced in a grant of certiorari to review the right of petitioner to intervene in this case.

In light of the importance of the issue tendered and the differing approaches followed by the courts of appeals, the United States does not oppose the grant of a writ of certiorari to review the issues presented in the instant petition.

Respectfully submitted.

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